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Collaborative Co-Parenting and Heteronormativity: Recognising the Interests of Gay Fathers

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Keywords: same-sex parents; gay fathers; family law; assisted reproduction; procreative consciousness; multiple parents.

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Abstract

The legal regulation of same-sex parenting in England & Wales promotes the heteronormative model of women-led homonuclear families as the archetype of same-sex parenting. The law's privileging of women-led same-sex parenting is evident in how the courts resolve collaborative co-parenting disputes where gay men and lesbians conceive a child together. This article analyses a number of recent collaborative co-parenting cases to argue that the judicial reasoning in these cases, which focuses on protecting the women-led homonuclear family, evidences a lack of proper regard for the 'procreative consciousness' of gay men.

The article further argues that the lamentable lack of explicit judicial consideration of the interests of gay men involved in collaborative co-parenting reflects the gender-based disparity perpetuated by the parenthood provisions of the Human Fertilisation and Embryology Act 2008. These provide for the recognition without court involvement of women-led, homonuclear families but not male-led parenting. Therefore, courts must be sensitive to this disparity by explicitly considering the procreative consciousness of gay men, as they currently do with the potential vulnerability of women-led families. Only in this way, will judicial reasoning reflect the

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various interests at stake in collaborative co-parenting arrangements rather than privileging a particular family form.

1. Introduction

The courts in England & Wales are increasingly being called upon to resolve gay and lesbian parenting disputes involving children born as a result of reproductive collaborations between single or partnered lesbians and gay men.² These reproductive collaborations typically involve gay and lesbian individuals or couples who collaborate with other individuals or couples to conceive a child through assisted reproduction, either informally at home or formally in a clinic. A number of parenting arrangements might be envisaged when gay men and lesbians conceive in this way but the extent to which these are reflected in their parenting practices may vary. In this article, I am concerned with what is variously called poly-parenting or co-parenting³ and which I refer to as collaborative co-parenting. In doing so my ambition is to stress the collaboration of all involved in the parenting project.⁴ The characteristic feature of collaborative co-parenting that sets it apart from other types of parenting following assisted reproduction is the intention that each of the 'parents', often more than two, will remain actively involved in the child's life. The characteristic feature of the decided cases is that they concerned disputes between the putative parents⁵ about the levels of involvement that were agreed prior to conception. My concern is that the interests of the gay men involved in these arrangements are often

² For a detailed discussion of the case law see L Smith, 'Tangling the web of legal parenthood: legal responses to the use of known donors in lesbian parenting arrangements' (2013) 33 *Legal Studies* 355.

³ See for example A Zanghellini, 'Lesbian and Gay Parents and Reproductive Technologies: The 2008 Australian and UK Reforms' (2010) 18 *Feminist Legal Studies* 227; D Cutas and S Chan, *Families - Beyond the Nuclear Ideal* (Bloomsbury Academic 2012)

⁴ The increasing presence of these judicial disputes has occurred alongside increased visibility in society of gay and lesbian collaborative co-parenting, for example through TV programmes such as *The New Normal* (Ali Adler, Ryan Murphy and Katherine Shaffer [Creators] The New Normal (NBC Network 2012 – 2013)) and newspaper columns discussing lived experiences of collaborative co-parenting (e.g. Charlie Condou, 'The Three of Us' *The Guardian* (July 2012) <<http://www.guardian.co.uk/lifeandstyle/series/the-three-of-us>> accessed December 2016).

⁵ 'Putative parents' is used here to denote the adults involved in facilitating the conception/birth of the child rather than in a strictly legal sense.

neglected in favour of the protection of women-led homonuclear⁶ families, which currently dominates judicial reasoning in these cases.

In this article, I examine the legal regulation of collaborative co-parenting from the perspective of gay men's 'procreative consciousness'.⁷ My argument is that, in the context of collaborative co-parenting, the relevant legislation, judicial decisions and the academic critique fail to acknowledge the distinctive desire of gay men to parent. The article juxtaposes the parenting ambitions of gay fathers and those of women-led parents. My intention is not to undermine the legal recognition of autonomous women-led parenting (and the great strides that have been made in that direction recently) but to advocate for greater awareness of and explicit reference to the needs of gay fathers in collaborative co-parenting arrangements.

The argument proceeds in three stages. I start by analysing the fact that the Human Fertilisation and Embryology Act 2008 (HFEA 2008) consciously includes recognition of women-led same-sex parenting but omits any reference to male-led same-sex parenting or collaborative co-parenting. That omission suggests that gay fathers, and indeed any contemplation of the plurality of queer families,⁸ were never properly considered when the legislation was passed, partly because of the reluctance to address issues relating to surrogacy and a reluctance to unsettle the well-established principle that gestation results in legal parenthood.⁹ As Russell J remarked in the recent collaborative co-parenting case of *H v S (Disputed Surrogacy Arrangements)*,¹⁰ 'the lack of a properly supported and regulated framework for arrangements of this kind has, inevitably, led to an increase in these cases before

⁶ This term is used in the Australian case of *Re Patrick (An Application Concerning Contact)* (2002) 28 Fam LR 579 to denote a family where a lesbian couple have conceived a child which they raise together without the involvement of the biological father. For a discussion of this case see F Kelly, 'Redefining Parenthood: Gay and Lesbian Families in the Family Court — the Case of *Re Patrick*' (2002) 16 *Australian Journal of Family Law* 1.

⁷ A notion first advanced by psychologists based in the USA: see W Marsiglio, 'Male Procreative Consciousness and Responsibility: A Conceptual Analysis and Research Agenda' (1991) 12 *Journal of Family Issues* 268; Dana Berkowitz and William Marsiglio, 'Gay Men: Negotiating Procreative, Father, and Family Identities' (2007) 69 *Journal of Marriage and Family* 366.

⁸ For more on this see V Lehr, *Queer Family Values: Debunking the Myth of the Nuclear Family* (Temple University Press 1999).

⁹ See J McCandless and S Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form' (2010) 73 (2) MLR 175. Genuine engagement with the procreative consciousness of gay men would necessitate a review of the current legal framework which fails to accommodate the complexities of surrogacy and in particular international surrogacy.

¹⁰ [2015] EWFC 36, [2016] 1 FLR 723.

the Family Court'.¹¹ The legislative framework, therefore, forms a key part of the legal context in which collaborative co-parenting cases are being decided.

Given the absence of legislative recognition of the interests of gay fathers, I go on to address the way in which courts have, and ought to have, responded to this omission. Using the lens of gay men's procreative consciousness, I analyse the recent case of *H v S*¹² to argue that, although a desirable outcome may have been achieved, the judicial reasoning supporting this outcome did not reflect a genuine engagement with the interests of gay fathers. I suggest that, were judges to be more aware of the procreative consciousness of gay men, they would be inclined to give greater weight to their interests as fathers in collaborative co-parenting disputes. This does not necessarily require judges to enquire into the specificity of men's experiences of reproduction but simply to consider explicitly gay men as reproductive beings in their own right.¹³ This in turn would provide reassurance that courts were fully taking account of and giving proper recognition to the interests that gay men, like lesbians, have in conceiving and raising children in collaborative co-parenting arrangements.

The critique that I offer in this article addresses itself to the commentary on the cases that have been written by other scholars. As I have indicated, my concern has been that the courts do not acknowledge the procreative consciousness of gay men. However, it seems to me that scholars critical of judges have also failed to make adequate provision for that procreative consciousness. Many of these critiques suggest that, in 'imposing' fathers on women-led families, judges are reinforcing a heteronormative model of the family. My position is that these critiques fail to allow space for gay men's procreative consciousness. My analysis concentrates on *Re G (A Minor)*; *Re Z (A Minor)*.¹⁴ I problematize analyses of this case which appear to me to be too quick to assume heteronormative influences on the judicial resolution of collaborative co-parenting disputes. In adopting this position, I take issue with the way in which some commentators have deployed the concept of heteronormativity

¹¹ *Ibid* [2].

¹² [2015] EWFC 36, [2016] 1 FLR 723.

¹³ In other words, gay men have their own desires, wishes and experiences in relation to having children that are not mediated through women.

¹⁴ [2013] EWHC 134 (Fam), [2013] 1 FLR 1334.

as a lens through which to critique collaborative co-parenting cases. The complexity inherent in collaborative co-parenting cases and, what is more, the contested nature of heteronormativity as a theoretical construct necessitate a more nuanced approach to the interpretation of judicial dicta in relation to same-sex parenting disputes. I am particularly concerned that genuine judicial attempts to engage with the interests of gay fathers (even though this may not have been what happened in *Re G; Re Z*)¹⁵ should not be dismissed in academic critique as disguised attempts to impose fathers on women led families.

The object of this three-stage analysis is to contribute a perspective which is missing from current research on same sex parenting. There is a considerable body of academic research that has been conducted on autonomous women-led parenting.¹⁶ This is not, I submit, reflected in a comparable level of research into the interests of gay men as parents.¹⁷ A number of these studies have referred to gay men's involvement in the conception of children but these have tended to focus on their role in facilitating women-led families. Studies that explore the families of lesbians and gay men who conceived children together tend to focus on the kinship relationships they establish with one and other rather than their legal relationship.¹⁸ This article, by contrast, presents a more sustained focus on the importance of judicial cognisance of the procreative consciousness of gay men involved in conceiving children in a collaborative co-parenting arrangement. I do not see this as a

¹⁵ *Ibid.*

¹⁶ See for example P Nordqvist and C Smart, *Relative strangers: family life, genes and donor conception* (Palgrave Macmillan 2014); L Smith, 'Is Three a Crowd: Lesbian Mothers' Perspectives on Parental Status in Law' (2006) 18 CFLQ 231; K Arnup and Susan B Boyd, 'Familial Disputes? Sperm Donors, Lesbian Mothers and Legal Parenthood' in D Herman and C Stychin (eds), *Legal Inversions* (Temple University Press 1995); H Bos, 'Lesbian Mother Families Formed Through Donor-Insemination' in A Goldberg and K Allen (eds), *LGBT-Parent Families: Innovations in Research and Implications for Practice* (Springer 2013); A Cameron, "'A chip off the old (ice) block?: Women-led families, sperm donors and family law'" in J Kilty (ed), *Women and the Law* (Canadian Scholar's Press 2013); Catherine Donovan, 'Who Needs a Father? Negotiating Biological Fatherhood in British Lesbian Families Using Self-Insemination' (2000) 3 *Sexualities* 149; G Dunne, 'Opting into Motherhood: Lesbians Blurring the Boundaries and Transforming the Meaning of Parenthood and Kinship' (2000) 14 *Gender & Society* 11; F Kelly, 'Autonomous from the start: single mothers by choice in the Canadian legal system' (2012) 24 CFLQ 257.

¹⁷ There are some notable exceptions, for example, A Goldberg, *Gay Dads: Transitions to Adoptive Fatherhood* (New York University Press 2012); and G Mallon, *Gay Men Choosing Parenthood* (Columbia University Press 2004). However, these have largely been about adoption.

¹⁸ See for example D Dempsey, 'Conceiving and Negotiating Reproductive Relationships: Lesbians and Gay Men Forming Families with Children' (2010) 44 *Sociology* 1145 and D Dempsey, 'More like a donor or more like a father? Gay men's concepts of relatedness to children' (2012) 15 *Sexualities* 156

resurgence of heteronormative influences on same-sex families.¹⁹ Rather my intention is to align myself with scholars, like Daniel Monk, who suggest that we should better appreciate the complexity of 'potentially "hidden stories" of contemporary gay and lesbian connections with children within legal frameworks premised on equality' but which 'take place outside of statutory reform agendas and litigation strategies'.²⁰

2. Background Context: Gender and Power in Collaborative Co-Parenting Disputes

This article is arguing for greater sensitivity to the affective experiences of gay men in the context of collaborative co-parenting arrangements. As such, there is little discussion of the emotional investment (let alone financial/economic position) of lesbian mothers. As Richard Collier puts it in the context of his discussion of fathers' rights activism:

[w]hat may appear at first sight to be 'lost'...are the structural contexts, the gendered nature and materiality of men's and women's lives, as well as, importantly, consideration of how gendered ideas of parenthood are historically grounded within social contexts shaped by relations of power.²¹

Collier argues, however, that '[d]rawing attention to the complexity and gendered dimensions of men's experiences does not by itself detract from recognition of how power relations remain fundamental...' ²² Instead, he suggests that this 'can be part of a wider project seeking to contribute to contemporary feminist engagements with law'. ²³

¹⁹ Which is what Harding is concerned judges are doing: R Harding, '(Re)inscribing the Heteronormative Family' in Robert Leckey (ed), *After legal equality: family, sex, kinship* (Routledge 2015) 186.

²⁰ D Monk, 'Sexuality and Children Post-Equality' in Robert Leckey (ed), *After legal equality: family, sex, kinship* (Routledge 2015) 201.

²¹ R Collier, 'Men, Gender and Fathers' Rights "After Legal Equality" in R Leckey (Ed), *After Legal Equality* (Routledge 2015) p 66.

²² *Ibid.* p 67.

²³ *Ibid.*

Therefore, while I do not explicitly address the impact of gendered power relations in this article, the broader socio-legal context surrounding co-parenting disputes remains highly relevant. It is important to bear in mind, for example, that '[e]ven as more mothers participate in the labour force and more fathers take an interest in children, women carry disproportionate responsibility for care labour and for children'.²⁴ Despite this, the gendered way in which parenting operates in many families is obscured by the law's focus on formal equality. As Susan Boyd *et al.* note:

While most feminists and most women support the notion that men have the same capacity to parent as women, the question of imposed equality in this field is more problematic. The reality of women's typically greater responsibility for childcare cedes to the powerful idea that women and men are equally able to parent.²⁵

This tension between prioritising formal equality between parents and prioritising the legal recognition of caregiving features prominently in post-separation parenting disputes. Indeed, fathers' rights claims are often based on the recognition of status based on biology without any explicit consideration of caregiving.²⁶

It is important to acknowledge the discursive power of fathers and knowledge of genetic identity when legal disputes about parenting occur and the potential threat this presents to autonomous women-led parenting. As Boyd *et al.* highlight, '[a] further potential constraint on women's choice is the "almost unassailable presumption" that children have a right to know their genetic origins in an age of widely available DNA genetic testing'.²⁷ This has resulted in single mothers by choice

²⁴ S Boyd, 'Still Gendered After All This Time: Care and Autonomy in Child Custody Debates' in N Priaulx and A Wrigley (eds), *Ethics, Law and Society: Volume V* (Ashgate 2013) p 70. See also R Collier and S Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Hart 2008) p 128 - 132.

²⁵ S Boyd, D Chunn, F Kelly and W Wieggers, *Autonomous Motherhood? A Socio-Legal Study of Choice and Constraint* (University of Toronto Press 2015) p 9.

²⁶ See for example C Smart 'The Ethic of Justice Strikes Back: Changing Narratives of Fatherhood' in A Diduck and K O'Donovan, *Feminist Perspectives in Family Law* (Routledge 2006); R Collier, 'Fathers 4 Justice, law and the new politics of fatherhood' (2005) 17 CFLQ 511; R Collier 'The fathers' rights movement, law reform and the new politics of fatherhood: Reflections on the UK experience' (2009) 20 *Journal of Law and Public Policy* 65; R Collier and S Sheldon (eds), *Fathers' Rights Activism and Law Reform in Comparative Perspective* (Hart 2006).

²⁷ S Boyd, D Chunn, F Kelly and W Wieggers, *Autonomous Motherhood? A Socio-Legal Study of Choice and Constraint* (University of Toronto Press 2015) p 19. See also C Smart 'Law and the Regulation of Family Secrets' (2010) 24 (3) *IJLPF* 397.

experiencing a sense of vulnerability in relation to their legal position.²⁸ At the same time, however, gay men in collaborative co-parenting disputes are 'reproductive outsiders'²⁹ and as such may be more vulnerable than the relatively more powerful lesbian mothers. According to Biblarz and Stacey, for example, 'gay male parents challenge dominant practices of masculinity, fatherhood, and motherhood more than lesbian co-mothers depart from normative femininity or maternal practice'.³⁰ In arguing for greater acknowledgement and recognition of gay men's procreative consciousness in the context of collaborative co-parenting my intention, therefore, is not to diminish the possibilities of autonomous women-led parenting or to minimise the importance of recognising caregiving. I am rather suggesting that this is one currently neglected consideration that needs to be taken into account in order to reflect the stake each of the parents has in being involved with and caring for their children.

3. Same-Sex Parenting and the Legislative Framework

While it is laudable that same-sex parenting is being recognised legislatively to a greater extent than ever before, it is important not to overlook the way that the legislative framework privileges some forms of same-sex parenting over others. Autonomous women-led parenting has become fairly well embedded in the legal imagination.³¹ Gay men, on the other hand, feature much less prominently. The fact that the parenthood provisions of HFEA 2008 only expressly deal with women-led parenting demonstrates this most explicitly. Since the coming into force of the HFEA 2008 it has been possible for single women and female partners to register as the only legal parent(s) of a child from birth, without any court involvement.³² This option, however, is not open to single men or male couples; the child's birth mother is

²⁸ F Kelly, 'Autonomous Motherhood and the Law: Exploring the Narratives of Canada's Single Mothers by Choice' (2012) 28 *Canadian Journal of Family Law* 63.

²⁹ J Millbank, 'Unlikely Fissures and Uneasy Resonances: Lesbian Co-Mothers, Surrogate Parenthood and Fathers' Rights' (2008) 16 *Feminist Legal Studies* 141, 143.

³⁰ T Biblarz and J Stacey 'How Does the Gender of Parents Matter?' (2010) 72 *Journal of Marriage & Family* 3.

³¹ For more on the limitations and assimilationist approach of the legal imagination in this regard see C Jones, 'The Impossible Parents in Law' in C Lind and others (eds), *Taking Responsibility, Law and the Changing Family* (Ashgate Publishing 2011); See also J Wallbank and C Dietz, 'Lesbian mothers, fathers and other animals: is the political personal in multiple parent families?' [2013] CFLQ 451, 459.

³² HFEA 2008, ss 42 – 44.

always a legal parent at birth.³³ This suggests that, rather than attempting to address the needs of same-sex parents generally, the legislation focuses primarily on the legal recognition of lesbian parenting. This is reinforced by the fact that in the parliamentary debates around these parenthood provisions, 'same-sex couple' was often treated as synonymous with 'female same-sex couple' and often used alongside 'single mother' without any discussion of single male parents.³⁴

This conflation is more apparent in the explanatory note accompanying Part Two of the 2008 Act which states that it is 'intended to put same sex couples and unmarried opposite sex couples in the same position as married couples.'³⁵ However, it is only able to highlight the specific provisions that do this for female same-sex couples³⁶ as there are no equivalent provisions for male couples. It is, then, specifically 'same sex female couples' that 'are put on ... the same legal footing ... as their equivalent opposite-sex unmarried couples.'³⁷ Baker J expressed a similar understanding of the 2008 Act in *Re G (A Minor); Re Z (A Minor)*,³⁸ where he stated that parliament's intention in enacting this legislative reform was 'to put lesbian couples and their children in exactly the same legal position as other types of parent and children.'³⁹ The same cannot be said of male couples.

Male partners who satisfy the conditions of the Act (in the context of surrogacy) can, nevertheless, apply for a parental order.⁴⁰ This makes them – and not the gestational mother – the legal parents. However, this court-based process adds an extra level of complication and bureaucracy which gay men must navigate to become parents.⁴¹ A male same-sex couple can never automatically be recognised as the parents of a

³³ *Ampthill Peerage Case* [1977] AC 547; Human Fertilisation and Embryology Act 2008, s 33.

³⁴ See for example Hansard Commons Debates, cols. 186–187, 20 May 2008.

³⁵ Explanatory Note, Human Fertilisation and Embryology Act 2008, C 22 [16].

³⁶ Explanatory Note, Human Fertilisation and Embryology Act 2008, C 22 [14].

³⁷ S Burns, *The Law of Assisted Reproduction* (Bloomsbury Professional 2012) 347.

³⁸ [2013] EWHC 134 (Fam), [2013] 1 FLR 1334. See also P Bremner, 'Lesbian parents and biological fathers – leave to apply for contact' (2014) 36 JSWFL 83

³⁹ *Ibid* [114].

⁴⁰ Human Fertilisation and Embryology Act 2008, s 54: the conditions include the birth mother's consent, a genetic link between one of the men and the child, and a family relationship between the men.

⁴¹ For a summary of the case law on granting parental orders and the requirements that need to be satisfied see C Fenton-Glynn, 'The Regulation and Recognition of Surrogacy under English Law: An Overview of the Case-Law' (2015) 27 (1) CFLQ 83. See also M Welstead, 'The Hurdles Fall: Surrogacy and Parental Orders' (2015) Fam Law 1415.

child from birth in the way that a female same-sex couple can be.⁴² Furthermore, single men cannot (at present)⁴³ become lone legal parents in this way, whereas single women can make use of the parenthood provisions to become single parents.

I am not arguing here for symmetry in the approach to gay male and lesbian parents given that autonomous gay male parenting would often involve surrogacy, with all its attendant ethical, philosophical and practical complications,⁴⁴ rather than donor conception. However, it is noteworthy that the legislature's reluctance to review surrogacy laws has meant that recognition of gay male parenting has been overlooked while the recognition of lesbian parenting has improved considerably. Therefore, this disparity between the automatic recognition of women-led families and its absence for male-led families, as well as the relative procreative difficulties encountered by gay men who want children, are key parts of the contextual background against which collaborative co-parenting arrangements are formed.

In addition to the gender-based disparity in the legal recognition of same-sex parenthood, the way the parenthood provisions of the HFEA 2008 channel same-sex families into a heteronormative model is problematic.⁴⁵ While recognising the progressive nature of some aspects of the reforms, a number of commentators have remarked on their limited scope; the reforms do not, for example, apply to female couples conceiving at home unless they are in a civil partnership or same-sex marriage.⁴⁶ What is more, the Act does not countenance the legal recognition of more than two parents (which collaborative co-parenting arrangements often involve). Under this legislation one or more of the adults in a collaborative co-parenting arrangement cannot be recognised as a parent.⁴⁷ This is as a result of the

⁴² This is largely due to the enduring principle of gestation as the default basis for legal parenthood.

⁴³ But see *Re Z (A Child) (No 2)* [2016] EWHC 1191, [2016] 2 FLR 327 where Sir James Munby declared that it was incompatible with articles 8 and 14 of the ECHR to restrict the availability of parental orders to couples.

⁴⁴ See Warnock M, *A Question of Life: The Warnock Report on Human Fertilisation and Embryology* (Blackwell 1984); See also Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements' (2010) 22 CFLQ 449.

⁴⁵ J Wallbank, 'Channelling the Messiness of Diverse Family Lives: Resisting the Calls to Order and De-Centring the Hetero-Normative Family' (2010) 32 JSWFL 353.

⁴⁶ *Ibid.* 354; See also J McCandless and S Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family' (2010) 73 MLR 175, 191.

⁴⁷ Collaborative co-parenting which occurs between two individuals would not necessarily present the same difficulties in terms of legal parenthood.

deeply entrenched nature of the two-parent model on the legal imagination.⁴⁸ This binary assumption about parental status exacerbates the tensions within collaborative co-parenting disputes creating a competition over legal recognition.⁴⁹ The failure to allow for the possibility of collaborative co-parenting, therefore, creates an environment in which the explicit consideration of the role gay men might play in raising children with lesbian co-parents is seen as a threat to autonomous women-led parenting rather than as an expression of gay men's procreative consciousness.

4. *Judicial Recognition of Gay Men's Procreative Consciousness*

In the recent collaborative co-parenting case of *H v S*,⁵⁰ the court missed the opportunity explicitly to acknowledge the procreative consciousness of gay men and allow this to guide their reasoning. Instead, the court was more circumspect in the way in which it disposed of the case, treading a fine line between what was in the best interests of the child and what the adults agreed prior to conception. In this section, I examine the reasoning in the case in greater depth and suggest ways in which gay men's procreative consciousness might have been usefully used to support, what was ultimately, a desirable outcome. Before doing this, however, it is necessary to consider what is meant by procreative consciousness and how this relates to the way in which gay men are positioned in relation to parenthood.

The idea of procreative consciousness was developed by US psychologists to explain how men, particularly gay men, can feel at a disadvantage in the procreative realm. For Marsiglio, men's procreative consciousness refers to 'men's cognitive and affective activity within the reproductive realm'.⁵¹ There is a considerable body of feminist scholarship about women's experiences of reproduction and having

⁴⁸ J McCandless and S Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family' (2010) 73 MLR 175.

⁴⁹ For a more in-depth discussion of the problems associated with parental status see C Lind and T Hewitt, 'Law and the complexities of parenting: parental status and parental function' (2009) 31 JSWFL 391.

⁵⁰ [2015] EWFC 36, [2016] 1 FLR 723.

⁵¹ W Marsiglio, 'Male Procreative Consciousness and Responsibility: A Conceptual Analysis and Research Agenda' (1991) 12 *Journal of Family Issues* 268, 269.

children.⁵² However, there is a lack of theorising around men's participation in the procreative realm. In the words of Marsiglio *et al*:

Every day, all over the world, men think about having babies, imagine themselves as parents, struggle with infertility, donate gametes, hear of unintended pregnancies, receive news of fetal abnormalities, make decisions about abortions, and become parents. Although feminist scholarship has centred these experiences in women's lives, it has inadequately explored their meanings in men's lives.⁵³

Much of the scholarship on same-sex parenting has focused on the autonomy of single women and female couples with the experiences of men being situated in relation to female reproductive autonomy.⁵⁴ However, as Inhorn *et al.* argue, 'men need to be considered reproductive in their own right'.⁵⁵

Traditionally, arguments about the gendered nature of reproduction and caring for children relate to how a disproportionate burden of caring duties fall on women because it is somehow seen as natural that it should be women who care for children. As Smart and Neale comment,

Feminists have long striven to challenge the myth of motherhood in which it has been assumed that the birthing process gives rise to love and bonding and that mothers and children unambiguously love one another.⁵⁶

⁵² See for example A Rich, "Anger and Tenderness: The Experience of Motherhood" in E Whitelegg (ed), *The Changing Experience of Women* (Blackwell 1985); J Ribbens, *Mothers and Their Children: A Feminist Sociology of Childrearing* (Sage 1995); C Everingham, *Motherhood and Modernity: An Investigation into the Rational Dimension of Mothering* (Open University Press 1994).

⁵³ W Marsiglio, M Lohan, and L Culley, 'Framing Men's Experience in the Procreative Realm' (2013) 34 *Journal of Family Issues* 1011, 1013

⁵⁴ F Kelly, *Transforming law's family: the legal recognition of planned lesbian motherhood* (UBC Press 2011); L Smith, 'The Problem of Parenting in Lesbian Families and Family Law' (Queen's University Belfast 2007); D Dempsey, 'Conceiving and Negotiating Reproductive Relationships: Lesbians and Gay Men Forming Families with Children' (2010) 44 *Sociology* 1145; K Almack, 'Seeking sperm: accounts of lesbian couples' reproductive decision-making and understandings of the needs of the child' [2006] *IJLPF* 1.

⁵⁵ M Inhorn, T Tjornhoj-Thomsen, H Goldberg and M Mosegaard, *Reconceiving the Second Sex: Men, Masculinity and Reproduction* (Berghahn 2009), 3.

⁵⁶ C Smart and B Neale, 'Rethinking Family Life' in *Family fragments?* (Polity Press 1999) 18.

However, Beck stresses that the gendered nature of reproduction can cut both ways, with men now feeling at a disadvantage in relation to reproduction.⁵⁷ As Beck highlights, ‘... fathers become aware of their disadvantage, partially naturally and partially legally. The woman has possession of the child as a product of her womb, which we all know does belong to her, biologically and legally...’⁵⁸ As Marsiglio contends, one aspect of men’s procreative consciousness is that ‘at various times during their lives men are likely to feel as though many or all of the aspects of the reproductive realm are not relevant to them’.⁵⁹ Writing in the US context, Marsiglio argues:

[males] have seldom had a phenomenological experience comparable, or even remotely similar, to what females have experienced during gestation and labor. Although it is impossible to determine the extent to which these factors have shaped and suppressed males’ procreative consciousness and sense of responsibility, it appears that these physiological and cultural forces, in combination with more structural conditions associated with males’ relationship to the economic and family/household spheres of social activity, have had a significant impact.⁶⁰

Berkowitz and Marsiglio have explicitly applied this conceptual framework of men’s procreative consciousness, developed in the context of heterosexual men, to gay men who are negotiating their procreative identities.⁶¹ Indeed, gay men have arguably been conceived of as reproductive beings in their own right to an even lesser degree than heterosexual men.

Historically, gay male identity has been seen as inconsistent with conceiving and raising children. This is reinforced by the prejudicial way that the courts have treated gay fathers in the past. In *Re D (An Infant) Adoption: Parent’s Consent*,⁶² the House

⁵⁷ U Beck, *Risk Society: Towards and New Modernity* (Sage 1992) 113.

⁵⁸ *Ibid.*

⁵⁹ W Marsiglio, ‘Male Procreative Consciousness and Responsibility: A Conceptual Analysis and Research Agenda’ (1991) 12 *Journal of Family Issues* 268, 270.

⁶⁰ *Ibid.* 275.

⁶¹ D Berkowitz and W Marsiglio, ‘Gay Men: Negotiating Procreative, Father, and Family Identities’ (2007) 69 *Journal of Marriage and Family* 366, 372.

⁶² [1977] AC 602 HL.

of Lords dispensed with the consent of a gay father to the adoption of his child by the mother and her new partner on the ground that any reasonable father would consent. According to Lord Wilberforce, the father's refusal to consent ran the risk of the child being exposed to experiences which 'may lead to severance from normal society, to psychological stresses and unhappiness and possibly even to physical experiences which may scar them for life'.⁶³

Although lesbians now benefit from greater legislative and judicial recognition as parents, they were previously in an analogous position to that which gay men currently find themselves in. As recently as 1998, child welfare concerns in relation to same-sex parenting were raised within the then Labour government with one minister remarking, 'I am not in favour of gay couples seeking to adopt children because I question whether that is the right start in life. We should not see children as trophies.'⁶⁴ These concerns were reflected in early post-separation custody cases where the mother has subsequently identified herself as a lesbian. The courts in these cases highlighted the risks presented to the child of being raised by a lesbian couple, risks which were supposedly exacerbated if the couple were 'militant lesbians'.⁶⁵

Since then, however, courts have been explicit about how mindful they are of protecting women-led homonuclear families. *Re D*,⁶⁶ (formerly known as *Re M (Sperm Donor Father)*,⁶⁷ for example, is one of the earliest cases involving a known sperm donor decided in E&W. At that time, the main way for a lesbian co-mother to acquire parental responsibility was through a joint residence order with the birth mother, which the lesbian couple had previously obtained. The court in *Re D* had to decide whether to grant parental responsibility to the biological father (Mr B). Although the court did give the biological father parental responsibility, Mrs Justice Black clearly indicated that she only did so because 'the grant of parental

⁶³ *Ibid.* 629. For an insightful discussion of this case see D Bradley, 'Homosexuality and Child Custody in English Law' (1987) 1(2) *IJLPF* 155. I am grateful to Daniel Monk and Liz Trinder for their suggestions in this regard.

⁶⁴ Comments of the then Home Secretary, Jack Straw, on Radio 4's Today Programme in November 1998. This is quoted in Leanne Smith, 'The Problem of Parenting in Lesbian Families and Family Law' (PhD Thesis, Queen's University Belfast 2007) 72.

⁶⁵ *B v B (minors) (custody: care and control)* [1991] 1 FLR 402, 410.

⁶⁶ *Re D* [2006] EWHC 2 (Fam).

⁶⁷ *Re M (Sperm Donor Father)* [2001] Fam Law 94.

responsibility to Mr B alongside the sort of undertaking that he offers would amount to a grant of a status, stripped of practical effect'.⁶⁸ Indeed Mrs Justice Black was careful to affirm that the family the female couple had formed with the child was potentially fragile and deserved protection describing the birth mother's partner as 'the most vulnerable person in this situation, whom society will view to some extent as "the cuckoo in the nest"'.⁶⁹

The emphasis that courts place on the protection of the women-led homonuclear family is now reinforced by the statutory reforms described in section 3 above. This is reflected in Mr Justice Baker's decision in *Re G; Re Z*⁷⁰ discussed in more detail in section 5 below. In a sentiment echoing Mrs Justice Black's remarks in *Re D*, Mr Justice Baker noted that 'the policy underpinning [the 2008 Act] reforms is an acknowledgement that alternative family forms without fathers are sufficient to meet a child's need.'⁷¹ While the legal position in relation to lesbian mothers has changed considerably in recent years from judicial reluctance or opposition to acceptance and the desire to protect, the same cannot be said with respect to gay fathers.

Although *Re D (An Infant)*, discussed above, was decided a number of decades ago now, this scathing indictment of gay fatherhood continues to impact detrimentally upon the way in which male same-sex parenting is perceived. Mallon notes that:

Many people, including some child welfare professionals, are more than a little uncomfortable discussing gay men who are the primary parents raising children...[T]he enduring belief in our society [is] that parenting is the natural and sole domain of women...The concepts of heterosexuality and parenthood are so inextricably intertwined in our culture that the suggestion of gay fatherhood appears alien, unnatural, even impossible.⁷²

Therefore, the perception persists that gay men as parents challenge fundamental norms of family life in a way that lesbian parents do not.

⁶⁸ *Re D* [2006] EWHC 2 (Fam) [21].

⁶⁹ *Re D* [2006] EWHC 2 (Fam) [64].

⁷⁰ [2013] EWHC 134 (Fam), [2013] 1 FLR 1334.

⁷¹ *Ibid.* [113].

⁷² G Mallon, *Gay Men Choosing Parenthood* (Columbia University Press 2004) 1.

What is more, there have been a number of qualitative empirical studies where the gay male participants seem to have internalised and echoed these sentiments.⁷³ As Berkowitz and Marsiglio highlight, for example:

[F]or some of these men, being socialized into a world that stereotypes gay men as pedophiles constrained their ability to envision themselves as future fathers. Even worse...it is not uncommon for gay men to incorporate these heterosexist myths and irrational stereotypes into their own self-concept.⁷⁴

Although this particular stereotype did not appear in Heaphy *et al.*'s recent study of civil partnerships,⁷⁵ they did find that a number of the male couples they interviewed felt it was wrong for gay men to become parents. Berkowitz and Marsiglio further note that 'many young childless gay men are apprehensive about becoming fathers because they are overly concerned with how outsiders would perceive them' and implicitly their family.⁷⁶ Another particularly problematic stereotype is the perception of the gay male community as being uniformly 'sexually voracious' and characterised by 'the freedom to have many sexual partners'.⁷⁷ This enhances the perception of those outside the gay community that gay men are unsuitable primary carers and also affects those within the gay community. These studies suggest, therefore, that traditional stereotypes about how inconsistent parenting is with the gay male lifestyle abound. These stereotypes may have a detrimental effect on those gay men who do want to be parents or would wish to feel they had the choice.

This societal/cultural resistance to the idea of gay male parenthood forms an inescapable part of the socio-legal background that surrounds the legal recognition of gay men as parents. In light of this, it is important to acknowledge the extra-legal effects that legal recognition can have in combating resistance to the recognition of gay men as parents. As Kelly notes, 'law plays a significant role in the lives of

⁷³ See for example *ibid* 20; D Berkowitz and W Marsiglio, 'Gay Men: Negotiating Procreative, Father, and Family Identities' (2007) 69 *Journal of Marriage and Family* 366, 372.

⁷⁴ D Berkowitz and W Marsiglio, 'Gay Men : Negotiating Procreative, Father, and Family Identities' (2007) 69 *Journal of Marriage and Family* 366, 374.

⁷⁵ B Heaphy, C Smart and A Einarsdottir, *Same Sex Marriages: New Generations, New Relationships* (Palgrave Macmillan 2013) 162.

⁷⁶ *Ibid* 375.

⁷⁷ D Dempsey, 'Beyond Choice Family and Kinship in the Australian lesbian and gay "baby boom"' (La Trobe University 2006) 242.

marginalized communities, not only because it is capable of extending concrete rights to them, but also because of the symbolic content of that action.⁷⁸ On this basis, the current lack of culturally-embedded support for gay male parenthood is a compelling reason why courts should explicitly acknowledge in their reasoning the need to recognise gay men as parents, in the way the courts, and legislation, currently do in relation to lesbian mothers.

By way of illustration of this point, the recent collaborative co-parenting case of *H v S*,⁷⁹ provided an opportunity for the family court to acknowledge and identify the interests of gay male parents, which it lamentably did not seize, despite reaching a desirable outcome. The case concerned a dispute between a male couple, H and B, who were in a long-term relationship but not a civil partnership, and a single woman, S. The main issue at stake was the residence of M, a child conceived as a result of a reproductive collaboration between the three adults. According to the male couple, the child, conceived with H's sperm and carried to term by S, was to live with H and B, and S was to have a subsidiary parenting role. S, however, disputed this, claiming that although she and H were to co-parent M, B had not been involved and M was to live with S.

Although the Human Fertilisation and Embryology Act 2008 was in force when M was born in 2014, it did not determine M's legal parents because S was not married and conception did not occur in a licensed fertility clinic. As a matter of common law, therefore, S, as the birth mother, was the legal mother and H, determined to be the biological father by DNA test, was the legal father.⁸⁰ Furthermore, a parental order under section 54 of the Human Fertilisation and Embryology Act 2008 was not applicable because that would have extinguished the birth mother's legal parenthood, which none of the parties sought and to which the birth mother did not consent. Upon birth, S, who had parental responsibility as the birth mother, registered the child under her surname with her as the sole parent. H successfully applied for parental responsibility as the biological father before a Deputy District

⁷⁸ F Kelly, 'Transforming Law's Family: The Legal Recognition of Planned Lesbian Families' (University of British Columbia 2007) 35

⁷⁹ [2015] EWFC 36, [2016] 1 FLR 723.

⁸⁰ *Amphill Peerage Case* [1977] AC 547.

Judge but B was not successful in his application for parental responsibility in the same case as he was neither a step-parent nor a parent in terms of the HFEA 2008.

Consequently, the dispute in *H v S* was not over legal parenthood but rather concerned a child arrangements order and also whether or not B would be awarded parental responsibility. The Deputy District Judge ordered that both men were to have unsupervised contact with M. H and B were also successful in obtaining a prohibited steps order to prevent S from baptising M, which S proceeded to do and initially lied to the court about. At the time of the hearing in the Family Court, before Russell J, S continued to disrupt contact between M and the male couple but, despite that, overnight contact had been occurring and a relationship had developed between the men and M. Russell J found that the case did not concern a surrogacy arrangement and as such fell to be decided by the ordinary principles contained in the Children Act 1989 and, in particular, was governed by the paramountcy of the welfare of the child.⁸¹ The conclusion the court reached in this regard was that the welfare of the child was best served if she lived with H and B, if B had parental responsibility and if S was given supervised contact, each of which the court ordered.

This case is particularly noteworthy because of the specific mention of the agreement that existed between S and the two men prior to conception in deciding what was in the best interests of the child. Russell J noted:

The circumstances of M's conception and birth are relevant because M will, in time, need to understand the background to her birth and, secondly, because it will inform and assist the court in reaching its decisions to conclude what agreements were made prior to M's conception and birth.⁸²

Russell J's seeming willingness to take into account pre-conception intentions in the context of collaborative co-parenting as a relevant factor, albeit with limited impact on the actual outcome, is commendable and should be adopted in subsequent

⁸¹ Children Act 1989, s 1 (1).

⁸² *H v S (Disputed Surrogacy Arrangements)* [2015] EWFC 36, [2016] 1 FLR 723 [8].

cases.⁸³ This, however, needs to be interpreted in light of the fact that the mother also frustrated contact and breached a court order. It is not self-evident that such an agreement would be enforced where the mother's conduct was not brought into question.

The case evidences a lack of conceptual clarity about the relationship between pre-conception intentions and the best interests of the child. The case involved a child arrangements order and parental responsibility order, both of which concern the 'upbringing of a child' and, therefore, child welfare is necessarily the court's paramount concern.⁸⁴ Lord MacDermott gave the following guidance in relation to the paramountcy principle in the seminal case of *J v C*:⁸⁵

'...when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare. That is...the paramount consideration because it rules upon or determines the course to be followed'.⁸⁶

On this basis, Mary Welstead is critical of what she describes in her comment on *H v S* as an 'unusual, and Draconian, order to remove a 15-month old baby girl from her mother'.⁸⁷ She argues that the judge placed a surprising amount of emphasis on the pre-conception agreement given that the best interests of the child are the court's paramount consideration. Despite this, Welstead accepts that given the judicial approach on this matter it would be preferable 'if all agreements to procreate, whether by way of surrogacy, sperm donation, or co-parenting, were to be regulated by law. Agreements could then be entered into with the secure knowledge that they

⁸³ For further discussion of the merits of relying on adults' intentions in the context of parenting see Gillian Douglas, 'The Intention to be a Parent and the Making of Mothers' (1994) 57 MLR 636–641; John Lawrence Hill, 'What Does It Mean to Be a Parent--The Claims of Biology as the Basis for Parental Rights' (1991) 66 *New York University Law Review* 353; Marjorie Maguire Shultz, 'Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality' [1990] *Wisconsin Law Review* 297–398; Boyd SB, 'Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility' (2007) 25 *Windsor Yearbook of Access to Justice* 63; Zanghellini A, 'Who Is Entitled to Parental Responsibility - Biology, Caregiving, Intention and the Family Law Act 1975 (CTH): A Jurisprudential Feminist Analysis' (2009) 35 *Monash University Law Review* 147.

⁸⁴ Children Act 1989, S 1 (1).

⁸⁵ [1970] AC 668.

⁸⁶ *Ibid* 710.

⁸⁷ M Welstead, 'The Battleground of Gay Parenthood and the Role of Agreements' (2015) 45 (7) *Fam Law*.

would normally be enforced'.⁸⁸ As I discuss below, however, the wording of the judgment is framed in a way that suggests the pre-conception intentions are merely a secondary consideration with concerns about the harm the child will suffer with the mother taking precedence. Nevertheless, it may be that in this case the best interests test is being used as a vehicle for enforcing the pre-conception intentions.

Lord MacDermott's dictum above strongly indicates that there will be one particular outcome that is most consistent with the child's best interests. However, such a determinative use of child welfare will not always be possible as a number of potential outcomes may be broadly consistent with child welfare to a similar degree.⁸⁹ As Zanghellini comments:

The welfare standard is sufficiently amorphous that, when applied free of heteronormative preconceptions about what constitutes ideal parenthood and ideal parenting configurations, it will rarely dictate one single outcome, rather than suggesting a range of possible outcomes equally compatible with the child's best interest.⁹⁰

This suggests that where the welfare principle purportedly does dictate a specific outcome, in the absence of any obvious harm to the child, other factors may be implicitly influencing this. As Eekelaar puts it, the welfare principle 'might fail to provide sufficient protection to children's interests because its use conceals the fact that the interests of others, or, perhaps, untested assumptions about what is good for children, actually drive the decision.'⁹¹ For example, in some of the collaborative co-parenting cases the courts have been explicit about the sufficiency of same-sex parenting and their desire to protect the homonuclear family.⁹² However, in other cases the way the courts have disposed of the applications suggest that they are

⁸⁸ *Ibid.*

⁸⁹ See H Reece, 'The Paramountcy Principle: Consensus or Construct?' [1996] *Current Legal Problems* 267.

⁹⁰ A Zanghellini, 'A v B and C [2012] EWCA Civ 285' (2012) 24 CFLQ 475, 480.

⁹¹ J Eekelaar, 'Beyond the Welfare Principle' [2002] CFLQ 237 n 3.

⁹² See for example *A v B* [2012] EWCA Civ 285, [2012] 2 FLR 607..

considerably influenced by the biological connection between father and child *per se*.⁹³

Therefore, in cases like *H v S*, absent any concerns about the mother's parenting style, there is considerable force to the argument that it would have been broadly and similarly consistent with the child's best interests to live with either the mother or the father and his partner. The court could then have resolved the dispute in a way that would have been equitable for each of the parties. This could have involved acknowledging that the gay men's procreative consciousness has been particularly engaged and that gay male parenting is potentially fragile from the point of view of legal recognition. There would also have needed to have been a similar acknowledgement in relation to single female parenthood. Pre-conception intentions could then be used as a means of determining which of the two outcomes, each of which are similarly consistent with the child's welfare, should prevail. This, I submit, would have reflected a conceptually clearer and more genuine attempt to achieve justice for all involved while ensuring the outcome was consistent with the welfare of the child.

Instead, the court chose to focus on the harm the child is likely to suffer as a result of the birth mother's negative attitude towards the biological father and his partner, as well as the birth mother's parenting style, which the judge described as 'over emotional and highly involved'.⁹⁴ It is only in passing and incidental to this that pre-conception intentions are mentioned. Ms Justice Russell emphasises that '[i]t is not the function of this court to decide on the nature of the agreement between H, B and S and then either enforce it or put it in place... M living with H and B and spending time with S from time to time fortunately coincides with the reality of her conception and accords with M's identity and place within her family'.⁹⁵ Essentially, the court is indicating that the primary reason that the child will be living with H and B is because of the harm the child is likely to suffer with S and it is merely a happy coincidence

⁹³ See for example *Re B (Role of Biological Father)* [2007] EWHC 1952 (Fam). For a detailed discussion of the case law see L Smith, 'Tangling the web of legal parenthood: legal responses to the use of known donors in lesbian parenting arrangements' (2013) 33 *Legal Studies* 355.

⁹⁴ *H v S (Disputed Surrogacy Arrangements)* [2015] EWFC 36, [2016] 1 FLR 723 [117] – [119].

⁹⁵ *Ibid.* [125].

that this is what was agreed prior to birth. With respect, in my submission these priorities should be reversed.

It seems unnecessary to suggest that in order for the child to be able to live with H and B, she would need to be at risk of some harm from living with her birth mother. Even if there was no risk of harm, I would suggest that conceiving the child was an expression of the gay men's procreative consciousness, rather than that of the single woman, as evidenced by the pre-conception intentions. It is for this reason that the child should live with H and B. By emphasising the role the mother's parenting style and conduct had in determining the outcome, the court unnecessarily risks invoking the 'regressive and questionable...gendered images [of]...unruly and irresponsible mums' contrasted with 'safe fathers discursively positioned as seeking contact and sharers of responsibilities'.⁹⁶

Whether or not the child's welfare should be the court's paramount concern in such disputes is beyond the scope of this article.⁹⁷ However, even working within the framework of the paramountcy principle, it is possible and necessary to balance the interests of the adults involved. Herring advocates 'relationship-based welfare,' whereby '[t]he child's welfare is promoted when he or she lives in a fair and just relationship with each parent'.⁹⁸ Herring suggests this as a means of reconciling what may be seen as potentially conflicting interests of children and adults but it is also a useful way of conceiving of disputes where the interests of adults do not conflict with the welfare of the child but with each other. This has the advantage of avoiding Eekelaar's criticism that 'the very ease of the welfare test encourages a laziness and unwillingness to pay proper attention to all the interests that are at stake in these decisions'.⁹⁹ On this basis it is legitimate for the courts to use pre-conception agreements in resolving collaborative co-parenting disputes as a means of ensuring a fair outcome that is consistent with relationship-based welfare. As Herring and Foster argue, a 'child's thriving is crucially dependent on the thriving of

⁹⁶ R Collier, 'Men, Gender and Fathers' Rights "After Legal Equality" in R Leckey (Ed), *After Legal Equality* (Routledge 2015) p 61. See also C Smart and B Neal, *Family Fragments?* (Polity 1999).

⁹⁷ For an insightful discussion of the conceptual problems of the welfare principle see H Reece, 'The Paramountcy Principle: Consensus or Construct?' [1996] *Current Legal Problems* 267. See also E Jackson, 'Conception and the Irrelevance of the Welfare Principle' (2002) 65 *MLR* 176.

⁹⁸ J Herring, 'The Human Rights Act and the Welfare Principle in Family Law - Conflicting or Complementary?' [1999] *CFLQ* 223 n 83.

⁹⁹ J Eekelaar, 'Beyond the Welfare Principle' (2002) 14(3) *CFLQ* 237.

all the other stakeholders'.¹⁰⁰ Consequently, only by accepting the role that pre-conception intentions play can courts give effect to the procreative consciousness of gay men in a way that acknowledges the psychological utility of legal recognition in relation to gay fathers.

5. *Contesting Heteronormativity in the Commentary on Collaborative Co-Parenting Disputes*

A number of commentators have noted the influence of heteronormative constructs of the family on legal regulation.¹⁰¹ It is important to acknowledge that heteronormativity is a contested theoretical concept that cannot be applied to legal norms straightforwardly and uncritically. While I have implicitly identified the tensions inherent in its application when critiquing the legal framework and acknowledge it is not an unproblematic descriptor, I principally use the term 'heteronormative' to denote the ideal parenting model which requires a sexually intimate couple relationship even in the same-sex context. Nevertheless, I adopt Robyn Wiegman and Elizabeth Wilson's recent challenge to queer theory by not 'assuming a position of antinormativity from the outset'.¹⁰² In this way, I argue that some of the existing readings of the case law too readily identify judicial thinking as 'heteronormative'.

The central claim with respect to the heteronormativity of the legal regulation of parenthood is that it is wedded to the notion of dyadic gendered parenting.¹⁰³ In relation to lesbian couples who become parents the dyadic or two-parent element is not necessarily problematic, particularly for those couples who wish to form a homonuclear family.¹⁰⁴ However, the gendered element becomes problematic where the lesbian couple wish to form a homonuclear family without the involvement of the

¹⁰⁰ J Herring and C Foster, 'Welfare means relationality, virtue and altruism' (2012) 32 *Legal Studies* 480.

¹⁰¹ See for example S Boyd, 'Equality: An Uncomfortable Fit in Parenting Law' in Robert Leckey (ed), *After legal equality: family, sex, kinship* (Routledge 2014); Rosie Harding, '(Re)inscribing the Heteronormative Family' in Robert Leckey (ed), *After legal equality: family, sex, kinship*, (Routledge 2014).

¹⁰² R Wiegman and E Wilson, 'Introduction: Antinormativity's Queer Conventions' (2015) 26 (1) *Differences* 1.

¹⁰³ For more on this see S Boyd, 'Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility' (2007) 25 *Windsor Yearbook of Access to Justice* 63; J McCandless and S Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family' (2010) 73 *MLR* 175.

¹⁰⁴ See FN 6 above.

biological father. This type of family has garnered both legislative and judicial support and a number of commentators¹⁰⁵ are particularly critical of judicial interventions that might jeopardise this.

However, neither lesbian parenting practices nor families that lesbians form are homogenous. While some lesbians wish to form homonuclear families, others seek to challenge the traditional model of the family.¹⁰⁶ For those lesbians who seek to engage in a form of collaborative co-parenting it is the two-parent rather than gendered element of the heteronormative legal framework that is problematic. Therefore, while some may perceive a legal framework that facilitates the involvement of the biological father alongside a lesbian couple as heteronormative because it promotes gendered parenting,¹⁰⁷ others may perceive a legal framework that did not facilitate the involvement of the biological father alongside a lesbian couple as heteronormative because it promoted dyadic parenting based on conjugality.¹⁰⁸

The case of *Re G; Re Z*,¹⁰⁹ and the commentary on it, provide a good illustration of the inherent complexity in the idea of heteronormative conceptions of the family and the need for more sophisticated, nuanced analyses of judicial reasoning in this area. The case also provides an opportunity to examine these issues where it is a female couple's position as main caregivers that is perceived to be under threat, rather than

¹⁰⁵ See for example R Harding, '(Re)inscribing the Heteronormative Family' in Robert Leckey (ed), *After legal equality: family, sex, kinship* (Routledge 2014); K Arnup and S Boyd, 'Familial Disputes? Sperm Donors, Lesbian Mothers and Legal Parenthood' in D Herman and C Stychin (eds), *Legal Inversions* (Temple University Press 1995); N Polikoff, 'Breaking the Link Between Biology and Parental Rights in Planned Lesbian Families: When Semen Donors are not Fathers' (2000) 2 *Georgetown Journal of Gender & the Law* 57; N Polikoff, 'The Deliberate Construction of Families Without Fathers: Is it an Option for Lesbian and Heterosexual Mothers?' (1996) 36 *Santa Clara Law Review* 375; N Polikoff, 'This Child Does have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families' (1990) 78 *Georgetown Law Journal* 459.

¹⁰⁶ G Dunne, 'Opting into Motherhood: Lesbians Blurring the Boundaries and Transforming the Meaning of Parenthood and Kinship' (2000) 14 *Gender & Society* 11; Kelly, *Transforming Law's Family the Legal Recognition of Planned Lesbian Motherhood* (UBC Press 2011).

¹⁰⁷ See for example, R Harding, '(Re)inscribing the Heteronormative Family' in Robert Leckey (ed), *After legal equality: family, sex, kinship* (Routledge 2014).

¹⁰⁸ F Bernstein, 'The Child Does Have Two Mothers...And a Sperm Donor with Visitation' (1996) 22 *New York University Review of Law & Social Change* 1; M Jacobs, 'Why Just Two - Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents' (2007) 9 *Journal of Law & Family Studies* 309; L Smith, 'Is Three a Crowd: Lesbian Mothers' Perspectives on Parental Status in Law' (2006) 18 *CFLQ* 231; J McCandless and S Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family' (2010) 73 *MLR* 175.

¹⁰⁹ [2013] EWHC 134 (Fam), [2013] 1 *FLR* 1334.

a male couple as in *H v S. Re G; Re Z* concerns distinct but related applications by two men for leave to apply for orders under section 8 of the Children Act 1989 (i.e. residence and/or contact orders as they were then). In each of the cases, a child was conceived using the man's sperm and was born to a woman in a civil partnership. Since the adoption of the HFEA 2008, the civil partners were the legal parents and the biological father had no legal parental status. As a result, the biological father was not 'entitled to apply for a section 8 order' with respect to the child'.¹¹⁰ Instead, he required 'the leave of the court to make the application'.¹¹¹ This case, therefore, turned on whether the men should be granted leave to apply for such orders rather than on whether such orders should actually be granted.

The facts of the two cases are separate but linked. D and E, two women in a long-term relationship (by the time of the birth of the child, civil partners) approached a male couple with whom they were friendly (S and T). The male couple were also in a long-term relationship, subsequently becoming civil-partners, and the two couples discussed the possibility of having a child. S agreed to be the biological father of a child born to E. In December 2008, shortly after D and E's civil partnership, F was born as a result of home insemination. At this stage, the 2008 reforms had not come into force and, therefore, S was one of F's legal parents and had an automatic right to apply to the court for an order under section 8 of the Children Act 1989. Following F's birth, there seems to have been regular contact between S and F, although the frequency and quality of that contact was disputed. About a year after F's birth, E became pregnant again following home insemination using S's sperm and subsequently gave birth to G.

At the same time that E was pregnant with F, T provided sperm for X and Y (who were friends of D and E) and X subsequently became pregnant and gave birth to Z. Following birth, there was regular contact between T and Z. However, E sought to restrict contact after disagreements arose over T's assertion that he was the child's father rather a sperm donor. As G and Z were born to women in civil partnerships, following the coming into force of the 2008 act, S applied for leave to apply for a contact and residence order in respect of G, and T applied for leave to apply for a

¹¹⁰ As required by Children Act 1989 s10 (2) (a).

¹¹¹ *Ibid* s 10 (2) (b).

contact order in respect of Z. In granting leave to apply for the contact orders (but not a residence order), Baker J held that biological fathers in the applicants' position should not automatically be denied leave to apply for an order under section 8 of the Children Act 1989. He concluded on the basis of the facts of the case that the women had allowed relationships to develop between the biological fathers and the children, which suggested they should be granted leave to apply for a contact order.

Rosie Harding draws on this case to demonstrate that 'the implicit heteronormativity of the family survive[s] in contemporary...judicial discourse.'¹¹² Furthermore, she characterises the case as 'the reinscription of heteronormative understandings of family into a situation where the children in question were legally fatherless'.¹¹³ However, this is not immediately apparent from the outcome of the case. The effect of the decision was not, in fact, to make any orders relating to the biological father's relationships with the children but to grant them the opportunity to make their case in court just as any other adult with a close relationship with the child (such as a grandparent) might. As Baker J noted:

...no other person is absolutely excluded from seeking redress and...biological fathers who are deprived of legal parenthood by the 2008 Act should be treated no differently. Had parliament intended that a person in a position of the applicants in this case should be entirely stripped of legal remedies, it would have expressly provided that a person in the position of S and T in these circumstances would be disqualified even from seeking the court's leave.¹¹⁴

Furthermore, Baker J makes it clear that granting leave to apply is more about providing the biological father with access to justice than a sense that the substantive case will or should succeed. He stresses that 'it is well established that the granting of leave under s.10 (9) does not create a presumption in favour of a substantive order'.¹¹⁵ In his conclusion he further emphasises this point, perhaps

¹¹² R Harding, '(Re)inscribing the Heteronormative Family' in Robert Leckey (ed), *After legal equality: family, sex, kinship* (Routledge 2014) 186.

¹¹³ *Ibid.*

¹¹⁴ *Re G (A Minor) ; Re Z (A Minor)* [2013] EWHC 134 (Fam), [2013] 1 FLR 1334 [119].

¹¹⁵ *Ibid* [65].

even indicating that their chances of success are slimmer than the biological fathers may anticipate:

'I make it clear, however, that it does not follow that any substantive order for contact will be made in either case. Furthermore, if contact is ordered, it may well be significantly less frequent than the applicants are seeking'.¹¹⁶

However, Harding's criticisms are not primarily aimed at the outcome of the case but the use of language in the judgment.

Harding cites Baker J's use of 'biological father' to refer to the applicant rather than the respondents' preferred term of 'known donor' in support of her argument. In Harding's submission:

'By referring to the men as 'biological fathers', Baker J is drawing the discursive power of 'father' on to their side of the dispute.'¹¹⁷

Other commentators have made the link between reference to 'biological father' in *Re G; Re Z* and the promotion of heteronormative understandings of the family. Brown, for example, notes that '[Baker J's] chosen language suggests that the judgment is underpinned by assumptions and ideals that promote the traditional, heterosexual, 'nuclear family' model'.¹¹⁸ However, in evaluating Harding's and Brown's criticisms of Baker J's reference to the biological father as a way of reasserting the heteronormative family model, it is necessary to bear in mind the specific context in which these comments were made. Had the case concerned a female couple who had adopted a child or had conceived with the sperm of an unknown donor, it would have been a very different scenario. In those situations, it is unlikely the father would make any sort of parental claim and in the latter situation would not even know the child existed. It is also unlikely that the court would contemplate allowing such a claim. Therefore, it seems that any underlying normative assumptions (such as right to knowledge of biological origins) would be

¹¹⁶ *Ibid* [134].

¹¹⁷ R Harding, '(Re)inscribing the Heteronormative Family' in Robert Leckey (ed), *After legal equality: family, sex, kinship* (Routledge 2014) 186.

¹¹⁸ A Brown, '*Re G; Re Z (Children: Sperm Donors: Leave to Apply for Children Act Orders)*: Essential "Biological Fathers" and Invisible "Legal Parents"' (2014) 26 CFLQ 237, 240.

applied in a similar way to a same-sex couple as to a different-sex couple without any suggestion that a heteronormative bias would result in different treatment.

Both Harding and Brown uncritically accept the female couples' characterisation of the arrangements in *Re G; Re Z*, namely that the men were sperm donors who facilitated the female couples' desires to have children. They seem not to draw any distinction in this regard between sperm donors who are known to the couple and those who are not. However, the reproductive involvement of a man who is known to the family creates a different set of considerations that needs to be judged differently from unknown donation. Therefore, the way Baker J uses the term 'biological father' is not as straightforwardly heteronormative as it might have been had the case involved conception with an unknown donor.¹¹⁹

It is important to acknowledge that 'dyadic', 'gendered' and 'resulting from a conjugal relationship' are each elements of heteronormative parenting. In the interests of conceptual clarity, it is necessary that critiques of judicial dicta from the point of view of heteronormativity identify which of these elements are engaged. Therefore, I advocate for more nuanced analyses of judicial attempts to allow for the possibility of collaborative co-parenting families. This requires recognition that legal provisions or judicial dicta that seem potentially heteronormative in one respect may in fact be necessary in order to resist heteronormativity in other ways. A key feature of this more nuanced approach is the recognition that judicial attempts to accommodate the interests of gay fathers, and as a result give effect to the procreative consciousness of gay men, are not inherently heteronormative.

This is not to suggest, however, that such attempts cannot be heteronormative. It remains important to ensure that the justifications behind legislative and judicial approaches are genuine and are not merely disguised versions of heteronormativity. Furthermore, I am not suggesting that the judge in *Re G; Re Z* was motivated by a desire to accommodate collaborative co-parenting or to give effect to the procreative consciousness of gay men. It may well be that the judge was indeed influenced by a heteronormative view of the family as Harding and Brown suggest. My argument is

¹¹⁹ For more on the effect of the language used to describe biological fathers in these families see C Donovan, 'Who Needs a Father? Negotiating Biological Fatherhood in British Lesbian Families Using Self-Insemination' (2000) 3 *Sexualities* 149, 156; A Diduck, "'If Only We Can Find the Appropriate Terms to Use the Issue Will Solved': Law, Identity and Parenthood' (2007) 19 *CFLQ* 458.

that this is not an inevitable conclusion from the fact that the judge did not refer to the biological father as a known donor nor from the fact that he did not foreclose the possibility of an application for contact. It's possible that this was an appropriate approach based on the type of collaborative co-parenting arrangement that was being created. Whether or not this was what guided the court in *Re G; Re Z* would have been clearer had the judge explicitly considered the procreative consciousness of the gay men involved. Nevertheless, it is important to remain open-minded about the possibility that recognising the interests of gay fathers in collaborative co-parenting disputes, rather than imposing a heteronormative vision of the family, may in fact be a vital part of accommodating the plurality of same-sex families.

Conclusion

In this article, I have advocated for greater judicial cognisance of the interests of gay fathers, alongside existing awareness of the needs of lesbian mothers, in resolving collaborative co-parenting disputes. In doing this, the article has highlighted the rigidity of the existing legislative framework, which promotes a particular form of same-sex parenting. This framework does not allow for any judicial discretion in the determination of a child's legal parents following assisted reproduction. However, in cases such as *H v S* when deciding with whom a child will live and who has parental responsibility for that child, the court has discretion to determine which arrangement is in the child's best interests. In doing this, judges should explicitly consider and discuss the emerging and potentially fragile procreative consciousness of the gay fathers involved, alongside the protection of women-led parenting, in a relationship-based assessment of the child's welfare.

Genuine judicial attempts to engage with the interests of gay fathers in collaborative co-parenting disputes should not be labelled simply as heteronormative. Attempts to include gay fathers alongside lesbian mothers might, at first sight, appear to promote a different-sex parenting model. However, failure to consider the interests of gay fathers as well as lesbian couples is heteronormative in a different way because it automatically prioritises dyadic parenting based on the sexually intimate couple. Allowing for the potential development of a relationship between gay fathers and children in collaborative co-parenting families does not necessarily mean that biological fathers are being unjustifiably imposed on women-led families. Future

judicial attempts to accommodate the parental desires and needs of gay men in collaborative co-parenting disputes, if and when they arise, should be seen as representing a willingness to engage with gay men as something other than reproductive outsiders,¹²⁰ who are disenfranchised from parenthood in a way that lesbians no longer are. Only in this way can 'the recognition of the multi-layered, gendered dimensions of the emotional factors that impel participants on all sides of this debate' occur.¹²¹

¹²⁰ For more on this see J Millbank, 'Unlikely Fissures and Uneasy Resonances: Lesbian Co-Mothers, Surrogate Parenthood and Fathers' Rights' (2008) 16 *Feminist Legal Studies* 141, 143.

¹²¹ R Collier, 'Men, Gender and Fathers' Rights "After Legal Equality" in R Leckey (Ed), *After Legal Equality* (2015 Routledge) p 67.